KANDANDAPANI MUTHUCANAM & ANOR A

v.

MANDUCEKAP HI-TEC SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR B
NALLINI PATHMANATHAN JC
[ORIGINATING SUMMONS NO: D5-24-323-2006]
18 FEBRUARY 2009

CIVIL PROCEDURE: *Stay of proceedings - Non payment of costs - Application for all proceedings to be stayed until costs and damages paid by plaintiffs to defendants 'forthwith' - Whether plaintiff proved to have pursued a vexatious cause of action - Jurisdiction to stay proceedings exercised with great care and caution - Whether application ought to be refused* C D

The application (encl. 64) by the second to fourth defendants was for an order of security for costs in the sum of RM200,000 or such other sum as was deemed fit. Alternatively, the defendants prayed that all proceedings in this action be stayed until the costs and damages as ordered is paid by the plaintiffs to the second to fourth defendants 'forthwith.' It was this alternative prayer that comprised the subject matter of this application. Briefly, on 25 August 2007, the court, on disposing of an *inter partes* hearing relating to an injunction sought and obtained by the plaintiffs on an *ex parte* basis, proceeded to discharge the injunction and ordered the payment of costs and damages forthwith to the second, third and fourth defendants. Despite this, the plaintiffs failed to pay the sum of RM43,216.10 ordered to be paid by the court forthwith. The plaintiffs argued that the defendants' submissions on the order for a stay of proceedings pending payment of taxed costs and damages ordered by court had neither basis nor precedent and must therefore be refused. E F G

Held (dismissing encl. 64 with costs): H

(1) Where the application for a stay of proceedings rests solely on the ground of non-payment of costs, or on non-payment coupled with inability to pay, it could not succeed. If however, the action was vexatious, or the plaintiffs in the course of it, acted vexatiously towards the defendants, the court has jurisdiction to stay proceedings till the costs which the plaintiffs have been ordered to pay have been paid. This I

court was unable to conclude with any degree of certainty that the plaintiffs in this action have conducted their litigation oppressively or that the action filed was in itself vexatious. There was in fact a cause of action. (paras 16 & 18)

(2) On the basis of a perusal of the cause papers, it was difficult for this court to conclude that the plaintiff had acted oppressively or vexatiously in procuring an injunction. The fact that it may possibly be inferred from the order that costs be paid 'forthwith' that the plaintiffs acted vexatiously or improperly was too tenuous a basis on which to conclude firmly that they have so acted and that the action should therefore be stayed pending the payment of such costs. The nature of the dispute was diverse, wide-ranging and complex. Accordingly, it was not possible to conclude with certainty that the plaintiffs were indeed behaving vexatiously or pursuing a vexatious cause of action. As the jurisdiction to stay proceedings was to be exercised with great care and caution because it effectively stifled the plaintiffs' right to have their claim prosecuted, the application here ought to be refused. (paras 21 & 22)

Case(s) referred to:

Graham v. Sutton, Garden & Co [1897] 2 Ch 367 ***(refd)***

Ko Ko Ma Pony Horse Centre v. Rasa Sayang Beach Hotels (Pg) Bhd [1989] 1 CLJ 1019; [1989] 1 CLJ (Rep) 684 ***(refd)***

Re Wickham, Marony v. Taylor 35 Ch D 272 ***(refd)***

SVS Muthuraman Chettiar, etc v. E Kong Guan & Anor [1931] 1 LNS 28 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 23 r. 1(1)(a), (b), (c), (d), O. 59 r. 4(1)

For the plaintiff - Kabir Dhillon; M/s Soo Say Dhillon Sharma
For the defendant - Renu Zechariah; M/s Rosley Zechariah

Reported by Suhainah Wahiduddin

JUDGMENT

Nallini Pathmanathan JC:

[1] Enclosure 64 is fixed for disposal. It is an application by the 2nd to 4th defendants for an order of security for costs in the sum of RM200,000 or such other sum as is deemed fit. In

conjunction with this application for such security, a further consequent order is sought, namely that pending the furnishing of such security, all proceedings in this action be stayed. It is prayed that in the event there is a failure to furnish such security as is ordered by the court, then the originating summons be dismissed.

[2] Alternatively the defendants pray that all proceedings in this action be stayed until the costs and the damages as ordered *vide* order of court dated 25 August 2007 is paid by the plaintiffs to the 2nd to 4th defendants' 'forthwith'. It is this alternative prayer that comprises the subject matter of this application.

[3] In his affidavit in support of the said application dated 7 November 2007, Simjalam a/l Muniandy, the 3rd defendant ('D3') affirmed to the following facts:

(a) On 25 August 2007 the court, on disposing of an *inter partes* hearing relating to an injunction sought and obtained by the plaintiffs on an *ex parte* basis, proceeded to discharge the injunction on 9 November 2006, and order the payment of costs and damages forthwith to the 2nd, 3rd and 4th defendants.

(b) The said costs and damages were assessed and taxed to the amount of RM43,216.10;

(c) No review was undertaken in respect of the said taxation nor assessment of damages;

(d) Despite this the plaintiffs have failed and/or refused to pay the said sum of RM43,216.10 ordered to be paid by the court forthwith;

(e) The plaintiffs are impecunious and the defendants therefore have no assurance that they will be able to meet the costs of litigation should costs be awarded against them;

(f) There is a claim for RM1,005,857.35 which is the subject matter of litigation in D4-22-1139-2007 which has not been disposed of.

[4] The plaintiffs filed an affidavit opposing the application through the 1st plaintif, Kandandapani a/l Muthucanam ('P1') where he contends in reply that the sum sought by the defendants at that time, of RM250,000 as costs and damages was

A exorbitant and that (at that stage) the defendants had taken no steps to have the damages assessed or the costs taxed. This has now been done. Save for this no other averments were made.

[5] From the content of the defendants' written submissions it
B appears that they are proceeding under the alternative prayer, seeking an order staying all proceedings until the costs ordered to be paid 'forthwith' are indeed, paid. I say this because the defendant makes reference to the sequence of events culminating in the order of costs and damages to be paid forthwith which has
C not been honoured by the plaintiffs to date, notwithstanding the immediate nature of the order made by the court.

[6] On the law, the defendants rely on O. 23 to support their proposition; presumably that security for costs ought to be ordered.
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[7] The plaintiffs by way of reply submit that the defendants have failed to show that any one of the pre-conditions set out in O. 23 r. 1(1)(a)-(d) have been satisfied. None of the circumstances in which security may be ordered against an individual have been
E shown, as the plaintiffs do not fall into any of the categories set out in O. 23 r. 1(1)(a)-(d). In the absence of satisfaction of the pre-condition, it was further submitted, there was no necessity for the court to consider exercising its discretion to award security for costs. The defendants made no reply to this pertinent point.
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[8] Having considered the provisions of O. 23 r. 1(1)(a) it appears to this court that one of the four categories prescribed in r. 1(1)(a) to (d) has to be complied with prior to the court embarking on the exercise of balancing and weighing all the
G relevant circumstances to ascertain whether or not security for costs ought to be given. As the defendants have not shown that the plaintiffs fall into any of the said four categories, the conclusion that logically follows is that the provisions for the grant of security as envisaged under O. 23 have not been met. Therefore security
H for costs under O. 23 does not fall to be awarded.

[9] However the matter does not end there. The defendants have, *via* their written submissions, submitted primarily on the order for a stay of proceedings pending the payment of taxed
I costs and damages ordered by the court. The plaintiffs in response say simply that such application has neither basis nor precedent and must therefore be refused.

[10] Neither the defendants nor the plaintiffs provided case-law either in support of or in opposition of the application for a stay pending the payment of such costs and damages. Having undertaken my own research I found the following cases to be of use:

[11] In *SVS Muthuraman Chettiar, etc v. E Kong Guan & Anor, etc* [1931] 1 LNS 28, ('Muthuraman Chettiar') the defendants filed motions seeking *inter alia* an order staying all further proceedings in the action until after the plaintiff had paid to the defendants or into court the amount of taxed costs directed to be paid by the plaintiff to this defendant under a judgment procured earlier. Whitley J in delivering the decision of the court held as follows:

> ... I am satisfied that on the authority of *In re Wickham, Marony v. Taylor* reported in 35 Ch D 272 the Court has power to stay the proceedings whenever it can be shown that a person is proceeding vexatiously in not paying costs which he has been ordered to pay.
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> It is clear that under Section 1150 of the Civil Procedure Code, I have no power to dismiss the appeal in default as asked to do by the 2nd Respondent ...
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> *I am of the opinion that the appellant is proceeding vexatiously in not paying the costs which he has been ordered to pay and which both Respondents have asked him to pay. Appellant is entitled to recover against the second respondent certain costs which have not yet been taxed* ...

[12] As the costs had not been taxed in that case, the court went on to order security for costs. However it should be noted that the case relates to a failure to pay costs in respect of earlier or prior proceedings where judgment had been ordered. In short it relates to a subsequent action commenced by the appellant without paying the costs awarded against him in earlier proceedings. In the instant case, there has been a failure to comply with an order for the payment of costs in an interlocutory proceeding. The matter has not come to an end.

[13] In *Muthuraman Chettiar* reliance was placed on the English case of *Re Wickham, Marony v. Taylor* 35 Ch D 272 where the principle was stated thus by Cotton LJ in his judgment:

A ... Undoubtedly in the Court of Chancery, before the Judicature Acts and Rules, when a party was in contempt for non-payment of costs, there was the practice of ordering all proceedings to be stayed until such costs should be paid; and I know of no rule which confined that practice to the costs of an application going to the root of the action. Where a party was in contempt the Court on application properly made – but not at the hearing interfered to stay the proceedings on the ground that it would be unreasonable that a party in contempt should harass his opponent by further proceedings until he had paid what he had been ordered to pay. Then it was argued very strenuously that the old practice must be disregarded, and that the Court does not treat parties as in contempt for mere non-payment of costs. I do not look upon it from the narrow view of contempt, if that was the foundation of the old practice, but in my opinion the principle that then existed subsists still; and *if the Court thinks it unreasonable that proceedings should be allowed to so on, then the jurisdiction still remains, and ought to be exercised in a proper case. Section 24, sub-sect. 5 of the Judicature Act 1873, reserves to all the Courts generally the old power of restraining vexatious or unreasonable proceedings in any cause or matter before them, if they think fit.* Then it was pressed upon us that this general power is limited by the Rules of Court to the case therein specified. *But in my opinion it does not follow that the special power given by the Rules limits the inherent general jurisdiction in the Court to stay proceedings in proper cases* ...

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And LJ Lindley:

F ... *It appears to me that under the present practice, whenever it can be shown that a person is proceeding vexatiously in not paying costs which he has been ordered to pay, the Court has jurisdiction to stay the proceedings.* This rule is, I think applicable in all Divisions of the Court. To hold that the Court has no power to say that an action shall not be allowed to go on until such costs have been paid would be to prevent the Court from stopping vexatious proceedings and might lead to grievous injustice. The merits of each case must be looked at; and here the consequences of the non-payment of these costs might be very serious.

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H **[14]** From the foregoing cases, it appears that the court enjoys the inherent jurisdiction to stay proceedings where it appears to the court that a party is proceeding vexatiously in not paying costs which he had been ordered to pay. As such jurisdiction exists, the next issue that falls to be considered is under what

I circumstances the court should exercise its discretion to invoke a stay in the instant case. The cases above comprise authority for

the proposition that where a party is proceeding vexatiously, the court is empowered to stay all proceedings. As in all cases where the inherent jurisdiction of the court is sought to invoke the exercise of the court's discretion, such discretion must be applied with great care and caution.

[15] The case of *Graham v. Sutton, Garden & Co.* [1897] 2 Ch 367 is instructive. In that case the defendants appealed against the refusal of the judge in chambers to stay proceedings in the action until the plaintiff had paid the costs of an appeal which he had been ordered to pay by the Court of Appeal. Lindley LJ stated the principle to be applied thus:

> ... Mere non-payment of costs is not now enough to justify an order to stay proceedings. Under the old Chancery practice a person who failed to pay costs which he had been ordered to pay was liable to be attached for contempt, and being in contempt, he was not entitled to be heard. That was done away with by the Debtors Act 1869, and the principle that a person who does not pay costs is in contempt does not now prevail. ... The principles as to staying proceedings for non-payment of costs are the same in the Chancery and Queen's Bench Divisions, and that a party who has been ordered to pay costs has not paid them because he has no means to pay them is no ground for staying proceedings; and if there were nothing more in the case the order appealed from would be right. But we cannot ignore what was the foundation of the judgment of this Court when the plaintiff was ordered to pay these costs. The evidence then satisfied the Court that the plaintiff, who had got an order in the common form, one which in ordinary circumstances would be right, was making a most oppressive and scandalous use of it. In my judgment, where a plaintiff has been guilty of oppressive conduct in a suit, that with non-payment of costs is a sufficient ground for staying proceedings till the costs are paid. That is consistent with *In re Wickham*. Cotton LJ there says: "I do not say that mere non-payment of costs is enough – and if the late Mr. Justice Pearson *In re Youngs* thought so, I differ from him; ... The case must depend on its merits. I do not come to this decision on the ground of any general rule, but on the ground that the Court ought carefully to excise its jurisdiction, and having regard to the circumstances of the case, stay proceedings if it thinks them unreasonable." It appears to me that we are justified in applying that principle here; and where the plaintiff has used the process of the Court vexatiously, it is right to stay proceedings till the costs which he has been ordered to pay are paid.

[16] The clear principle that emanates from these various decisions is that where the application for a stay of proceedings rests solely on the ground of non-payment of costs, or on non-payment coupled with inability to pay, it cannot succeed. If however, the action is vexatious, or the plaintiffs in the course of it, act vexatiously towards the defendants, the court has jurisdiction to stay proceedings till the costs which the plaintiffs have been ordered to pay have been paid.

[17] Have the plaintiffs in the instant case acted veraciously towards the defendants, or is their action vexatious? Can it be said that the plaintiffs have acted oppressively towards the defendants?

[18] I must state that not having had conduct of this matter from the outset nor at any stage until this application, I have had to decide this issue on a somewhat cursory perusal of the cause papers filed in the action that too, somewhat selectively, in view of the voluminous papers involved. Having done so, I am unable to conclude with any degree of certainty that the plaintiffs in this action have conducted their litigation oppressively or that the action filed is in itself vexatious. There is in fact, a cause of action. The defendants' main cause of complaint is that the plaintiffs were guilty of material non-disclosure resulting in the *inter partes* injunction which had been granted (after the grant of the *ex parte* injunction) being set aside. The non-disclosure related to minutes taken of the result of voting conducted at the EGM of 18 August 2006, which in turn suggest that the contention of the plaintiffs that their votes were erroneously taken and tabulated, is without basis. However this document did not emanate from the plaintiffs but rather a group of directors who are stated to be aligned to the plaintiffs. The inference that the defendants sought to draw is that the plaintiffs being so aligned to these directors, knew or ought to have known of this document, which they suppressed from the court when procuring; the *ex parte* injunction and in the subsequent *inter partes* injunction. The plaintiffs in reply deny knowledge of this document and maintain that just because it was found with documents kept by directors seen to be aligned with them, it did not follow that they knew about the existence of the subject document. Neither, they maintain does it affect their claim as shareholders' who maintain that their voting rights have been adversely affected. In view of these competing contentions, it is not possible for this court to conclude definitively as to the truth or otherwise of the plaintiffs' stance.

[19] How did the court hearing the application to set aside the *inter partes* injunction consider this matter? There are no grounds from which I am able to assess the court's position on this matter. However the court did order that the *inter partes* injunction be set aside and went further to make the somewhat unusual order that costs be paid 'forthwith'. In *Ko Ko Ma Pony Horse Centre v. Rasa Sayang Beach Hotels (Pg) Bhd. (1)* [1989] 1 CLJ 1019; [1989] 1 CLJ (Rep) 684 Mohamed Dzaiddin J (as he then was) explained the circumstances in which an order for costs may be made forthwith in the course of interlocutory proceedings rather than at the conclusion of the action. Relying on O. 59 r. 4(1) His Lordship stated the principle as follows:

> ... From the above rule, it is clear that the court may deal with the question of costs at any stage of the proceedings or after the conclusion of the proceedings. Secondly the court may if it thinks fit, order the payment of costs to be paid forthwith notwithstanding that the proceedings have not been concluded ... Secondly an order for interlocutory costs should only be made payable 'forthwith' or 'in any event' when the party against whom the order has been made has been guilty of oppressive or unreasonable conduct *(Graham v. Sutton, Garden & Co.)* or the other party has taken unnecessary or improper action (*David Beans on Injunction* (3rd edn) p. 62) ...

[20] Can it then be inferred from the order made by His Lordship Ramly J setting aside the *inter partes* injunction and ordering payment of costs forthwith that the plaintiffs have been guilty of oppressive or unreasonable conduct to the extent that a stay of further proceedings is warranted? In the absence of clear words to that effect, it is difficult to so conclude, although it is a possible inference.

[21] As concluded earlier, it is difficult for this court on the basis of a perusal of the cause papers to conclude that the plaintiff has acted oppressively or vexatiously in procuring an injunction. The fact that it may possibly be inferred from the order that costs be paid 'forthwith' that the plaintiffs' acted vexatiously or improperly is, to my mind, too tenuous a basis on which to conclude firmly that they have so acted and that the action should therefore be stayed pending the payment of such costs.

[22] It is also evident from a perusal of the cause papers thus far, that there is a myriad of actions filed in several different courts in the commercial division in Kuala Lumpur as well as Shah Alam relating in one way or another to the dispute on Manducekap Sdn. Bhd. Mention is made in the instant cause papers of the various orders procured from these different courts. It is apparent from these various orders that the nature of the dispute is diverse, wide-ranging and complex. Accordingly it is not possible for this court to conclude with certainty that the plaintiffs are indeed behaving vexatiously or pursuing a vexatious cause of action. As the jurisdiction to stay proceedings is to be exercised with great care and caution because it effectively stifles the plaintiffs' right to have their claim prosecuted, I conclude that the application here ought to be refused. Enclosure 64 is dismissed with costs.